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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

CLARENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased,
Petitioner,
vs.
SOUTHERN RAILWAY COMPANY, a Corporation,
Respondent.
No. 161.

PETITIONER'S SUPPLEMENTAL STATEMENT, BRIEF AND ARGUMENT.

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OPINIONS BELOW.

The last opinion below, of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on April 14, 1941, is reported in 119 Fed. (2) 85, and will be found in the printed record beginning on page 436.

A former opinion of that court in the case, rendered on November 1, 1940, is reported in 115 Fed. (2) 317, and will be found in the printed record beginning at page 402.

STATEMENT.

Inasmuch as respondent, in points three and four of its brief, contends that the judgment of reversal below is sustainable upon grounds not passed upon or considered by the Court of Appeals in its last opinion, petitioner makes the following statement of facts touching those matters.

Mrs. Mary Stewart, widow of John R. Stewart, deceased, resided in East St. Louis, Illinois. She was appointed administratrix of the estate of the deceased by the Probate Court of St. Clair County, Illinois, at Belleville, Illinois, on April 16, 1937 (R. 8, 65). On or about the same day she employed counsel, Mr. Noell, to handle her case (R. 113, 114). The suit was filed in the District Court in St. Louis, Missouri, on April 20, 1937. Before Mrs. Stewart employed counsel, defendant's claim agent, one Hahn, came to see her twice trying to effect a settlement; and he had one Reno see her for the same purpose, Reno telling her he had been a friend of her deceased husband (R. 115-117, 303). After the suit was filed Hahn continued to see Mrs. Stewart in East St. Louis and made efforts to settle the case, and followed her to Colterville, Illinois, for that purpose and tried to persuade her to take $4,000.00, telling her that if she did not take it she would get nothing (R. 115-121). Subsequently, when she went on a visit to Hodgenville, Kentucky, in the summer of 1937, Hahn had a lawyer, one Hanley, see her in an effort to effect a settlement (R. 122-124, 303). She spent most of the summer in Kentucky, and upon returning went on a visit to Castleton, Illinois (R. 124, 125). Mrs. Stewart's son-in-law, one Hamm, was employed in Illinois by the Terminal Railroad Association of St. Louis as a brakeman. Respondent is one of the sixteen proprietary lines owning the Terminal (R. 148). Hahn, having failed to accomplish his purpose, went to Joseph F. Howell, general attorney

for the Terminal, at the latter's office in St. Louis and asked him to take a hand in the matter (R. 145, 146). Hahn said he went to Howell rather than to Hamm, because he thought that was the best way to handle it (R. 303); and he said "it worked, it worked all right" (R. 304). About a week later Howell called the Terminal's east side office by telephone and requested that Hamm be sent over to see him, and this was done (R. 147, 148). Howell testified that if one of the Terminal's proprietary carriers requested anything in his line that he could do for them, he did it (R. 148). He discussed with Hamm the matter of the settlement of Mrs. Stewart's case, and sent Hamm to see Bruce Campbell, one of respondent's counsel in East St. Louis (R. 148, 154). Thereafter, while Mrs. Stewart was at Castleton, Illinois, she received from her daughter, Mrs. Hamm, a telegram that had been sent by Hahn to her son-in-law, Hamm, telling Hamm that Compbell suggested that Hamm and Mrs. Stewart be at Hahn's office the following Thursday afternoon, saying it was important (R. 125). Mrs. Stewart then went to her daughter's home in East St. Louis. This was a few days before November 30, 1937, the date of the purported settlement. Mrs. Stewart talked with her son-in-law, Hamm, and her daughter, Mrs. Hamm, about the matter. Hamm told her he had been called to Howell's office in the legal department of the Terminal in St. Louis and had been told by Howell to see if he could not talk her into making the settlement, and had been told by Howell to go and see Campbell. Hamm said it meant his job, so he had better go and see Campbell and she had better talk with Campbell; that they were not hiring men of his age and he might lose his job (R. 172). He said he knew that his being called to the legal department of the Terminal had a meaning behind it (R. 249, 250); that it could only mean business; that they did not fool around inviting fellows over from work like that to have conversations with them; that they

did not have to make a threat, their being interested in it was enough (R. 251). Hamm told Mrs. Stewart, in Mrs. Hamm's presence, that he would like for her to settle the matter, that it would be a very good thing to do because of his being called in there; that it seemed that his company's interest was aroused toward this thing, and it would be the best thing, considering his position, to have Mrs. Stewart go down and settle the thing; that it was the only thing to do since he was concerned in it (R. 252, 253).

Mrs. Stewart testified that she knew that her son-in-law had been working for the Terminal for a long time; that if he should lose his job he might not get another one, and he had a family, a wife and two children to keep; that she was much worried, and thought if he would lose his job his wife and children would suffer (R. 173); and that Hamm was worried about his job (R. 181). She testified that she had never previously indicated to anybody that she would take $5,000.00 (R. 174), but that when she arrived at this law office all of the papers were ready for a settlement on that basis (R. 185), and that she made up her mind to sign when she was told at this law office by Wiechert that her son-in-law could lose his job; that it could be done and had been done (R. 185). Mrs. Hamm testified that at this meeting in this law office she brought up the question as to whether or not her husband's job might be in jeopardy (R. 255), saying that it did not seem fair to bring her husband and his job into it; and that Wiechert thereupon said it could be done and had been done (R. 258, 259). And Mrs. Stewart testified that after these conversations in this law office she was "just to where" she did not know what to do, and the more she studied she thought of those children that would suffer if her son-in-law would lose his job, so she agreed to take the $5,000.00, though it was not as much as she thought she ought to have (R. 174).

Respondent's counsel thereupon called in one Felsen, an attorney, who was introduced to Mrs. Stewart and her daughter, Mrs. Hamm. A petition had been prepared to be presented to the Probate Court for an order approving the settlement, and Felsen and Mrs. Stewart went to the Probate Court at Belleville where the petition was presented and the order was entered (R. 96, 98). On the same day a draft was issued by respondent for $5,150.00, payable to Mrs. Stewart, as administratrix, and to said Felsen, attorney, and she executed a release to respondent (R. 83-86). This draft was deposited in bank and out of the proceeds Felsen received $150.00 for his services (R. 198-200). It was admitted that on December 6, 1937, Mrs. Stewart tendered back to Wiechert, for respondent, said sum of $5,000.00, with interest thereon, and that the tender was refused (R. 168, 169).

Respondent, by its second amended answer (R. 5-8), set up the release executed by Mrs. Stewart, as administratrix, as barring a right of recovery, and pleaded the order of the Probate Court approving the settlement. By her reply the administratrix alleged that the settlement and her signature to the release had been procured by duress, coercion and oppression on the part of respondent, its agents, servants and employees, pleading the facts in that connection, and prayed that the release and contract of settlement be declared null and void (R. 13-17).

SUMMARY OF ARGUMENT.

I.

Respondent's contentions under points one and two of its brief to the effect that petitioner's petition for the writ rests upon unwarranted assumptions by petitioner, and that under the evidence adduced the ruling below in the last opinion of the Court of Appeals is in accord with applicable rulings of this Court, are without merit. The Court unsoundly ruled that no recovery could be had in the absence of direct proof that Stewart tried to use the pin lifter; and the Court and respondent both disregard the rule that the plaintiff is entitled to the benefit of every inference fairly deducible from the facts in evidence.

II.

This Court, having the entire record before it, has the power not only to review the action of the Court of Appeals, as shown by its last opinion, but the power to review the entire record and make such disposition of the case as the Court of Appeals should have made of it on the appeal to that court. And petitioner requests the Court to exercise such power.

III.

Respondent's contention that the order of the Probate Court of St. Clair County approving the purported settlement by Mrs. Stewart of her cause of action constituted a judgment that is not subject to collateral attack in the District Court, is without merit. Mrs. Stewart, as administratrix, being authorized by statutory designation to institute and maintain the action, was vested with full power to compromise the claim without any order of the Probate Court or of any other court. Such order gave the administratrix no power that she did not already possess;

and on the other hand, it could give no validity to a purported settlement voidable because of matters in pais.

IV.

The evidence adduced on the issue of duress amply sufficed to make that question one for the jury. As to what will constitute duress, the modern rule is that it matters not what form the coercion may take, provided it is such as to warrant a finding that the victim was deprived of free contractual volition. All of the surrounding facts and circumstances are to be considered and whether, in a given case, the execution of an instrument was procured by duress is usually one of fact for the jury. It is so in this case.

V.

The other points relied upon by respondent upon the appeal are likewise lacking in substance. The District Court's charge to the jury fully and fairly covered every issue in the case, from every standpoint, and is not open to any charge of error either by reason of anything included therein or because of anything omitted therefrom. The District Court did not err in instructing the jury that in the absence of any evidence that Stewart did not use the pin lifter the law presumes that he did use the pin lifter before going between the ends of the cars. The ruling of the Court of Appeals as to this instruction in its first opinion (115 Fed. [2] 317, 320, 322, R. 402, 408, 411) is unsound and in conflict with settled principles and with the decisions of this Court. And when the charge as a whole is considered, it is clear that the portion thereof above mentioned could not have misled the jury to the prejudice of respondent.

The judgment of the Court of Appeals of April 14, 1941 (R. 444), should therefore be reversed and the judgment of the District Court affirmed.

ARGUMENT.

I.

Points one and two of respondent's brief are devoted to an attempt to support the ruling of the Court of Appeals in its last opinion herein (119 Fed. [2] 85, R. 436, 444), to the effect that the evidence adduced by petitioner in support of the charge that respondent violated the automatic coupler provision of the Safety Appliance Act and that Stewart's death proximately resulted therefrom was insufficient to take those issues to the jury. The questions arising upon this phase of the case have been considered in petitioner's original brief, in support of his petition for the writ (pp. 22-35). The authorities cited by respondent in said points one and two of its brief do not support its said contentions for the reason that the fact situations involved in those cases differ very materially from those present in the instant case. This Court is thoroughly familiar with those cases, and we think it would serve no good purpose to encumber this brief by a detailed discussion of them.

Petitioner, however, desires to point out the basic error into which respondent has fallen and upon which it proceeds throughout these subdivisions of its brief. Under point one of its brief, beginning on page 18 thereof, respondent contends that petitioner's petition for the writ proceeds upon mere "assumptions," having no basis in the record. In this respondent is mistaken. In its argument respondent utterly fails to reckon with the rule that upon a defendant's demurrer to the evidence or motion for a directed verdict the evidence is to be viewed in the light most favorable to the plaintiff; that the evidence is to be taken most strongly against the defendant; that the plaintiff is entitled to the benefit of every rational infer-

ence that may be fairly deducible from the facts in evidence (Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720); and that if uncertainty as to liability arises, either by reason of a conflict of testimony or because reasonable and fair-minded men may honestly draw different conclusions from the evidence, the issue of liability is not one of law for the Court but one of fact to be settled by the jury. Best v. District of Columbia, 291 U. S. 411, 78 L. Ed. 882.

Respondent says, on page 18 of its brief, that petitioner has "assumed" that the deceased was injured while between two freight cars trying to open the knuckle of the coupler of one of them by hand in order to prepare the coupler for coupling by impact. There is no basis for this assertion by respondent. The evidence shows that at the time of Stewart's injury he was engaged in "coupling up cars." Such is the testimony of respondent's engineer, Martin (R. 44). Martin testified that Stewart would walk down a little way, give a back-up signal and a stop signal; that he coupled on again, walked back and gave a back-up signal, then a stop signal, and went between the cars; and that shortly thereafter Martin heard him "holler" (R. 44, 45). If inferences are to be utilized and indulged at all in a lawsuit, then, certainly, reasonable men may infer from this testimony that Stewart, whose object, purpose and duty it was to couple those two cars together, went in between the cars to effect such coupling, in the performance of such duty. And that he was trying to effect such coupling by hand inevitably follows by inference from that testimony and that of the witness Stogner who ran to him and found his forearm, between the wrist and the elbow, caught between the couplers (R. 29). Certainly a finding that Stewart was between those cars for the purpose of effecting a coupling by hand would not rest upon mere assumptions or conjecture.

And respondent in point one of its brief says that peti-

tioner has merely assumed that the Court of Appeals ruled that in order for the plaintiff below to make out a case it was essential to adduce the testimony of an eyewitness to the casualty affirmatively showing that the deceased employee tried to open the knuckle by operating the lever of the pin lifter at the side of the car before going between the cars to open the same by hand. But such is the rationale of the ruling of the Court of Appeals. The Court held that no case was made for the jury for the reason that it was the **duty** of the deceased to use the pin lifter; that there was no proof that he did so; and that the burden was upon the plaintiff to show that **such duty was performed** (119 Fed. [2] 85, l. c. 88, R. 441). Stewart being dead, direct proof of the performance of this so-called duty could not possibly have been made except by the testimony of an eyewitness who happened to be so situated as to be able to observe and who did observe just what Stewart did or did not do when he approached the opening between these cars and went between them. The Court of Appeals made the failure to adduce such testimony a vital controlling factor in the case, and refused to reckon at all with the presumption that arose that Stewart performed every duty that rested upon him, that he did not put himself in jeopardy of life and limb without first having ascertained that the coupling could not be effected without going between the cars. This, we submit, was plain error. The matter is more fully discussed under point I (A) of petitioner's original brief (pp. 24-30). What is there said need not be here reiterated.

And this should suffice to dispose of respondent's contention, on page 19 of its brief, that petitioner has merely assumed that the last-mentioned ruling of the Court of Appeals is such as to deny a recovery even though evidence be adduced to support a finding that the pin lifter was not in fact in efficient working order. The Court's

ruling in this portion of its opinion is such as to deny a recovery regardless of the evidence that was adduced as to the inoperative condition of the pin lifter, because the holding of the Court in this connection is to the effect that in the absence of proof that the deceased performed the duty that the Court said rested upon him, then, regardless of everything else, no recovery could be had.

And we may add that respondent's contention in these subdivisions of its brief that there was no evidence to support a finding that the pin lifter was not in efficient, working order, also utterly fails to reckon with the rule that in determining whether a case was made the plaintiff is entitled to the benefit of every fair and legitimate inference reosonably deducible from the evidence. And when this rule is considered, Stogner's testimony, we submit, fully sufficed to show that the pin lifting appliance was inoperative and inefficient. When Stogner went to couple these cars together shortly after the casualty he went between them and made the coupling by hand (R. 34), though he tried to use this pin lifter (R. 36). His statement that he tried to use the pin lifter carries with it the implication that he was unable to get it to function. And he testified that if the pin lifter is working it is not necessary to go between the cars to open the knuckle by hand (R. 34). To say that there is no evidence of an inoperative pin lifter under such circumstances is to say that sensible men upon a jury are not entitled to draw those natural, reasonable inferences that men in every walk of life constantly draw, utilize and act upon.

Nor is there any merit in respondent's contention that these drawbars may have remained jammed together as they were when Stewart's arm was caught between them, and that this may have prevented Stogner from operating the pin lifter. Martin's testimony shows that when it was

found that Stewart's arm was caught between the couplers he (Martin) moved the engine westwardly upon signal in order to release Stewart, separating the drawbars (R. 46).

II.

Under points three and four of its brief respondent discusses assignments of error made on the appeal from the District Court, though those matters were not considered by the Court of Appeals in its last opinion herein (119 Fed. [2] 85, R. 436-444); this upon the theory that those matters respectively afford ground for support of the Court of Appeals' judgment of reversal herein. We feel that nothing should deter this Court from reversing the last judgment of the Court of Appeals herein, predicated as it is upon an opinion which in one respect unsoundly decides an important question of federal law that, in its precise aspect, does not appear to have been expressly decided by this Court, as shown by petitioner's original brief (pp. 24-26), and which in other respects runs squarely counter to many prior decisions of this Court, as shown in petitioner's brief (pp. 28-35). However, we shall welcome the Court's consideration of those matters brought forward by respondent in said points three and four of its brief. They are below discussed under subdivisions III and IV of petitioner's argument herein. And petitioner trusts that this Court, having the entire record before it, will not only review the action of the Court of Appeals in its said last opinion and the additional questions thus raised by respondent, but the entire record, and make such disposition of this case as the Court of Appeals should have made upon the appeal to it from the District Court. This Court has, of course, power so to do.

In Story Parchment Company v. Paterson Parchment Paper Co., 282 U. S. 555, l. c. 567, 568, 75 L. Ed. 544, 550, 551, this Court said:

"Other assignments of error made on the appeal from the district court were not considered by the court below. No argument in support of these assignments has been submitted here, and respondents assume that they will be remitted for the consideration of the court below if the judgment of that court be reversed. The entire record, however, is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have made of it upon the appeal from the district court. *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257, 267; *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580, 588. And see *Langnes v. Green*, supra. Accordingly, we have examined these assignments, some eight in number. One or more of them involve questions which have been disposed of by the foregoing opinion. We find nothing in any of the others of sufficient substance or materiality to call for consideration.

"The judgment of the court of appeals is reversed and that of the district court affirmed."

III.

Respondent, under point three of its brief (pp. 29-31), contends that since the purported settlement by Mrs. Stewart of her cause of action was approved by an order of the Probate Court of St. Clair County, such order of approval constituted a judgment which could not be collaterally attacked. But it is plain that this contention is without merit; and the Court of Appeals in its first opinion herein properly so ruled (115 Fed. [2] 317, l. c. 321, R. 409, 410). Such order of the Probate Court is not a judgment that may be pleaded in bar. The real issue in this connection in the District Court was whether the release signed by Mrs. Stewart was voidable upon the grounds alleged. This order of the Probate Court is wholly inconsequential, and immaterial to any real issue

in the case. Mrs. Stewart, as administratrix of her deceased husband's estate, being authorized by statutory designation to institute and maintain the action against respondent under the Employers' Liability Act, was vested with full power to compromise the claim without any order of the Probate Court or of any other court. Treadway v. St. Louis, I. M. & S. Ry. Co., 127 Ark. 211, 190 S. W. 130; McCarron v. New York Central R. Co., 239 Mass. 64, 134 N. E. 478. The Court of Appeals in its first opinion herein, (115 Fed. [2nd] 317, l. c. 321, 322, R. 409, 410) said:

> "'Where, as here, the death action is one under the Federal Employers' Liability Act, it is governed exclusively by the federal law. The personal representative does not sue by his inherent right as representative of the estate of the decedent, but by virtue of statutory designation and as trustee for the person or persons on whose behalf the act authorizes recovery. And the recovery is not for the benefit of the estate, is not an asset thereof, but is for the personal benefit of the beneficiary or beneficiaries designated by the statute.'
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> "Chicago, Burlington & Quincy R. Co. v. Wells-Dickey Trust Co., 275 U. S. 161, l. c. 163; Taylor v. Taylor, 232 U. S. 363; Mann v. Minnesota Electric Light & Power Co., 10 Cir., 43 F. [2d] 36; American Car & Foundry Co. v. Anderson, 8 Cir., 211 F. 301, 308.
>
> "The widow was not compelled by law to apply to the Probate Court for authority respecting the compromise of this case, and we think the action of the trial court in rejecting the evidence of approval by the Probate Court of the compromise settlement was justified."

It is the well-settled rule, supported by the overwhelming weight of authority, that an administrator authorized by statute to sue for damages for the death of another may compromise the claim without applying to the Pro-

bate Court or any other court for authority so to do. Mann v. Minnesota Electric L. & P. Co., 43 Fed. (2) 36, l. c. 38; American Car & Foundry Co. v. Anderson, 211 Fed. 301, l. c. 308; Washington v. L. & N. Ry. Co., 136 Ill. 49, 26 N. E. 653.

Nor is the matter in anywise affected by the fact that the action here is in part to recover for conscious pain and suffering of the deceased before his death. Where a verdict is had for conscious pain and suffering of the deceased as well as for pecuniary loss resulting to the designated beneficiary or beneficiaries, the entire recovery is for the personal benefit of such beneficiary or beneficiaries. Chicago, B. & Q. R. Co. v. Wells-Dickey Trust Co., 275 U. S. 161, 163, 72 L. Ed. 216.

This order of the Probate Court was nugatory. It gave the administratrix no power she did not already possess. On the other hand, it could give no validity to a purported settlement that was voidable because of matters in pais. The fact that respondent's East St. Louis counsel had a lawyer, engaged and paid by respondent, go with Mrs. Stewart to the Probate Court, purport to act as her counsel, and go through the formality of obtaining an order approving the purported settlement (R. 1280, 1284), afforded no obstacle to the avoidance of the purported instrument of release. It is a fair inference that this action on the part of respondent's counsel (counsel who do not appear in this court) was originally intended as "window dressing"; something designed to give a semblance of respectability to the purported settlement, the facts surrounding which we shall presently discuss.

IV.

Under point four of respondent's brief (p. 32) it is contended that the judgment of the District Court should

have been reversed upon the ground that the evidence adduced was insufficient to warrant a finding that the purported release was procured by coercion or duress so as to warrant the avoidance thereof in the action in the District Court. Such contention, we submit, is devoid of merit.

While this question was not considered by the Court of Appeals in its last opinion, it was passed upon by that court in its former opinion herein. In holding that the facts and circumstances shown in evidence sufficed to make this issue one for the jury, the Court of Appeals in its first opinion (115 Fed. [2] 317, l. c.) quoted from its opinion in Winget v. Rockwood, 69 Fed. (2) 326, l. c. 330, as follows:

> "'* * * There is no legal standard of resistance with which the victim must comply at the peril of being remediless for a wrong done, and no general rule as to the sufficiency of facts to produce duress. The question in each case is whether the person so acted upon, by threats of the person claiming the benefit of the contract, was bereft of the quality of mind essential to the making of a contract, and whether the contract was thereby obtained. In other words, duress is not to be tested by the character of the threats, but rather by the effect produced thereby on the mind of the victim. The means used, the age, sex, state of health and mental characteristics of the victim are all evidentiary, but the ultimate fact in issue is whether such person was bereft of the free exercise of his will power.
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> * * * * * * *
>
> "'The trend of modern authority is to the effect that a contract obtained by so oppressing a person by threats as to deprive him of the free exercise of will, may be voided on the ground of duress. What constitutes duress is a matter of law; whether duress exists in a particular transaction is usually a matter of fact.'"

In no phase of the law, perhaps, have the rules and precepts of the early common law become more altered or relaxed. Under the modern doctrine, now recognized and applied by the courts generally, if not universally, in this country, evidence adduced tending to show that the signature to an instrument was obtained by any form of coercion exerted or caused to be exerted by the other party whereby the signer was deprived of the exercise of that free will and contractual quality of mind essential to the making of a valid contract, suffices to warrant the submission of the issue of duress and to support a finding that such instrument was procured by duress. The settled rule is that the test is not so much the particular means by which the signing of the instrument was procured, as it is the victim's state of mind that was induced by the means employed. The form that the coercion may take is not material, provided it was such as warrants a finding that the victim thereof was deprived of free contractual volition. On such issue all the surrounding facts and circumstances are to be considered. And, as said in the Winget case, supra, the question is usually one of fact for the jury. It is so in this case. Winget v. Rockwood (8 Cir.), 69 Fed. (2d) 326; White v. Scarritt, 341 Mo. 1004, 111 S. W. (2d) 18; Mississippi Valley Trust Co. v. Begley, 298 Mo. 684, 252 S. W. 76, 79; Miss. Valley Trust Co. v. Begley, 310 Mo. 287, 275 S. W. 540; Lipman-Wolfe & Co. v. Phoenix Assurance Co., 258 F. 544; Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284, 167 N. E. 69; Harris v. Flack, 289 Ill. 222, 124 N. E. 377; Farmers State Bank v. Dowler, 112 Nebr. 271, 199 N. W. 528; Guttenfelder v. Iebsen, 222 Ia. 1116, 270 N. W. 900; 17 Corpus Juris Secundum, Contracts, Sec. 175, pp. 533-535.

The modern rule is succinctly stated in 17 Corpus Juris Secundum, pp. 533, 534, 535, Sec. 175, as follows:

"The rule as it now exists is that the question of

duress is one of fact in the particular case, to be determined on consideration of the surrounding circumstances, such as age, sex, capacity, situation, and relation of the parties * * *. The test is not so much the means by which the party was compelled to execute the contract as it is the state of mind induced by the means employed."

In the instant case the instrument sought to be avoided is one purporting to release a widow's perfectly good and valid cause of action for the death of her husband, for a grossly inadequate consideration. After her husband's death Mrs. Stewart was appointed administratrix and obtained counsel who instituted in her behalf this suit in the District Court. Respondent's claim agent sought by every means within his power to bring about a settlement and release of the cause of action. He pursued Mrs. Stewart from place to place, and from state to state, telling her, in substance, that she had no cause of action and would get nothing unless she took what was offered her; though it appeared at the trial below that respondent had not a vestige of defense to the claim; no evidence to offer on the issue as to the alleged violation of the Safety Appliance Act. These efforts of Hahn to effect a settlement were made not only before the suit was filed but after Mrs. Stewart had obtained counsel and while her suit was pending, through attempted negotiations behind her counsel's back.

Respondent is one of sixteen proprietary lines owning the Terminal Railroad Association of St. Louis (R. 148). Hahn's prior efforts having failed to bring about a settlement, he learned that Mrs. Stewart's son-in-law, one Hamm, was employed by the Terminal as a brakeman in its yards in East St. Louis, Illinois, or vicinity. He thereupon set on foot a cunningly devised scheme for overcoming Mrs. Stewart's will power and coercing her into

making a settlement of her cause of action upon respondent's terms. He got in touch with Mr. Howell, the head of the legal department of the Terminal, and requested him to take a hand in the matter. He had Howell arrange to have Hamm called to the Terminal's legal department in the City of St. Louis to discuss the settlement of Mrs. Stewart's case. Howell did discuss the matter with Hamm, and this conference ended by Howell sending Hamm to see Mr. Campbell of the law firm of Kramer, Campbell, Costello & Wiechert of East St. Louis, Illinois, respondent's attorneys (R. 145-151, 304). Shortly thereafter Hamm received a telegram from Hahn, the claim agent, telling him that Campbell suggested a meeting at his office (R. 125, 179). This meeting was held on November 30, 1937; but in the meantime this telegram had been forwarded to Mrs. Stewart, who was at Castleton, Illinois (R. 249), and Mrs. Stewart hurried to East St. Louis and to the Hamm home where she, Hamm and Mrs. Hamm discussed the matter at length. The facts set out in our statement, supra, show that, because of what had occurred, Hamm had become thoroughly imbued with the fear that his employment with the Terminal, his job, was in jeopardy, and consequently urged Mrs. Stewart to settle the case; and that both Mrs. Stewart and Mrs. Hamm likewise became imbued with the fear of the loss by Hamm of his job if a settlement were not made on respondent's terms. The record is replete with evidence showing that the subject was discussed over and over again before the meeting in the office of respondent's East St. Louis attorneys; and that Mrs. Stewart, Hamm and Mrs. Hamm as well, were greatly worried over the matter (R. 172-182, 249, 253).

And at the meeting in this law office on November 30, 1937, at which Mrs. Stewart, Mr. and Mrs. Hamm and Wiechert, the attorney, were present—Hahn being there a

part of the time—the whole situation was discussed at length. Wiechert was handling the matter for respondent. The papers had all been prepared for a settlement on the basis of $5,000.00; though Mrs. Stewart had never agreed to accept any such sum or indicated that she would settle for that figure (R. 174). Wiechert admitted that he knew, not only that he was dealing with this widow in the absence of her attorney, but that her son-in-law, Hamm, had been called into the office of the general attorney for the Terminal in regard to bringing about of the settlement (R. 274, 275). And he also knew that by reason of what had been done, Mrs. Stewart, Hamm and Mrs. Hamm had become thoroughly imbued with the fear of Hamm's loss of employment if Mrs. Stewart did not accede to respondent's demand for a settlement on its terms; for the matter of Hamm's job being in jeopardy was brought up in this conference by Mrs. Hamm (R. 189, 254). She protested that it wasn't fair to bring her husband and his job into it, and discussed the matter in that vein at some length (R. 254). And at that juncture, according to the testimony of both Mrs. Stewart and Mrs. Hamm, Wiechert spoke up and said that Hamm could lose his job, that it had been done (R. 185-187); that it could be done and it had been done (R. 255). And the evidence shows that this had such an effect upon Mrs. Stewart that she capitulated, though she was dissatisfied with the amount offered (R. 174, 185). She said she made up her mind to accept the settlement when she was told that Hamm could lose his job (R. 185).

We submit that the evidence in this record pertinent to this phase of the case amply warranted the jury in finding, as the jury did, that this purported settlement and Mrs. Stewart's signature to the purported release were obtained by coercion and duress. A jury could well find that this scheme, set on foot by the claim agent, Hahn, fostered and

aided by Howell, the Terminal's general attorney, and ultimately consummated by Wiechert in the law offices of respondent's East St. Louis counsel, was designed from the outset to deprive Mrs. Stewart of free contractual volition in the matter by means of the fear that would naturally be aroused as to what might happen to her son-in-law's job if respondent's wishes and those of the Terminal were not carried out; a fear that would naturally be aroused in Hamm and be communicated to Mrs. Stewart, as the actors in this conspiracy well knew, and which might well be expected to have the very effect upon the victim that it evidently did have. It was not necessary that any express or overt threat be made by Howell as to loss of employment by Hamm. A request by Howell upon Hamm to take a hand in bringing about a settlement was tantamount to a command. Naturally the matter would not be so crudely handled by the head of the Terminal's legal department, in discussing the matter with Hamm, as to then and there, forthrightly and openly, threaten Hamm with the loss of his job. But that these conspirators intended to have Hamm understand and believe that he was threatened with the loss of employment, and to have this communicated by him to his mother-in-law, whereby to produce in her a state of mind that would make her subservient to the will of respondent's agents and attorneys, is a natural and logical conclusion from the facts of this record.

On the issue of duress threats may be implied from what is said and done. Mississippi Valley Trust Co. v. Begley, 310 Mo. 287, 275 S. W. 540; Benedict v. Roome, 106 Mich. 378, 64 N. W. 193. If those engaged in this unsavory affair in behalf of respondent intended that the course pursued by them operate as an implied threat as to the security of Hamm's employment, with the design of using that as a weapon whereby to make Mrs. Stewart

subservient to their will, and if Mrs. Stewart so understood it and was thereby so influenced as to be deprived of free contractual volition, as the evidence overwhelmingly showed, then this release was obtained by coercion and duress just as certainly as though obtained by the most direct and express threats. Benedict v. Roome, supra, 106 Mich. 378, 64 N. W. 193. There can be no doubt as to what were the intention and design of Hahn, the claim agent, in the matter. He was asked why he did not go to Hamm instead of asking Howell to have Hamm brought in, and his answer was that he thought the latter was the best way to handle it (R. 303). And he brazenly said, "It worked, it worked all right" (R. 304). And the evidence pointedly goes to show that when the matter was consummated in this law office, respondent's attorney Wiechert knew full well the state of mind that had been produced in the victim, Mrs. Stewart, and wrongfully took advantage thereof. He did not allay the fear that had been implanted in her mind regarding her son-in-law and his job. On the contrary, according to the testimony of both Mrs. Stewart and Mrs. Hamm, he took pains to let them know that their fears were not groundless; that Hamm could lose his job (R. 185, 258, 259). And Mrs. Stewart's testimony very pointedly shows that this operated to overcome her will; to bring about in her a state of mind whereby she was deprived of free contractual volition and rendered a victim of coercion and duress (R. 174, 189).

Obviously, we submit, the District Court was fully warranted in submitting this question to the jury, as it did by appropriate instructions; and the jury's verdict concludes the matter.

V.

Petitioner respectfully submits that upon this record the last judgment of the Court of Appeals herein should

be reversed and that of the District Court affirmed. Respondent's "Statement of Points Relied Upon on Appeal" (R. 349, 393) are formidable in number and extent of space covered, but lacking in substance. Those relating to the refusal of the District Court to direct a verdict for respondent (Points I and II, R. 349-356), to the refusal of respondent's motion for judgment non obstante veredicto (Point numbered XVIII, R. 393), and to the District Court's refusal to admit in evidence respondent's various exhibits relating to the proceedings in the Probate Court (Point XII, R. 368-377) have been covered by what is said in petitioner's original brief and hereinabove in this brief. Those relating to the admission and exclusion of testimony (Points XXIII, XXIV and XXVI, R. 378, 392), and to the refusal of the District Court to declare a mistrial (Point XXVII, R. 392, 393), obviously contain nothing of sufficient substance to warrant consideration. The remaining points (III to XXI, inclusive, R. 356-368) relate to alleged errors of the District Court in charging the jury (Points III and IV, R. 356-358), and in refusing respondent's requests to charge (Points V-XXI, R. 358-368). A reading of the Court's charge, to which we invite this Court's attention (R. 333-340), will, we think, suffice to refute every claim of error relating to the matter of charging or refusing to charge the jury. This charge, petitioner submits, fully and fairly covers the issues in this case, from every standpoint, and is not open to any charge of error either by reason of anything included therein or because of anything omitted therefrom.

In the first opinion of the Court of Appeals in this case (115 Fed. [2] 317, l. c. 320, 322, R. 402, 408, 411), the Court considered one isolated sentence of this charge and held—erroneously, petitioner submits—that it was error to include that sentence in the charge. This was the sole ground upon which the Court of Appeals in that opinion

based its order reversing the judgment and remanding the cause. However, the Court sustained petitioner's motion for a rehearing, as well as that of respondent (R. 435). The sentence of the charge referred to (which was the basis of respondent's Point III, R. 356, 357) is as follows:

> "You are instructed that it was the duty of the deceased in the performance of his work, before going between the cars mentioned in the evidence, to couple the same, to use the device mentioned in the evidence known as the pin lifter, extending on the outside of the car, and in the absence of any evidence that he did not use the pin lifter, the law presumes that he did use the pin lifter before going between the ends of the cars, if you find he did go between the ends of the cars."

The Court of Appeals, in its first opinion herein, criticized this part of the charge because of the inclusion therein of the words "and in the absence of any evidence that he did not use the pin lifter, the law presumes that he did use the pin lifter before going between the ends of the cars," saying that this language "is inconsistent with the burden of proof imposed by law upon a plaintiff" (115 Fed. [2], l. c. 322). But we respectfully submit that in so ruling the Court of Appeals inadvertently fell into error; an error that the Court perhaps subsequently perceived.

The presumption alluded to by the District Court in this part of the charge is one fully recognized by the law, and, under the circumstances of this case, no error was committed in informing the jury thereof. Since Stewart's lips are closed in death, if there is no evidence that he did not undertake to open the knuckle of the east car by using the pin lifter on that car, in order to avoid placing himself in peril of life and limb by going between the cars to open the knuckle by hand, the presumption prevails that he did undertake to use the pin lifter before going

between the cars; that he performed whatever duty may be said to have rested upon him in that connection; that he would not risk his life by voluntarily going between the cars and placing a portion of his body between the couplers without having ascertained, by attempting to use the pin lifter, that a coupling could not otherwise be effected. That such presumption prima facie arises; and that, if there is no evidence tending to repel it or put it to flight, it remains in the case as a factor to be reckoned with, is, we submit, incontrovertible.

Because of the love of life and the human instinct to avoid danger, the presumption always prevails, in the absence of evidence to the contrary, that a deceased exercised due care for his own safety. Miller v. Union Pacific R. Co., 290 U. S. 227, l. c. 233, 78 L. Ed. 285, l. c. 289; Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, l. c. 474, 48 L. Ed. 262, l. c. 267; that a deceased did not commit suicide (Travelers Ins. Co. v. McConkey, 127 U. S. 661, l. c. 667, 33 L. Ed. 308, l. c. 311; New York Life Ins. Co. v. Brown [5th Cir.], 39 F. [2d] 376); that a deceased performed whatever duty rested upon him in the premises (Worthington v. Elmer, 207 F. 306, 309; New Aetna Portland Cement Co. v. Hatt, 231 F. 611, 617).

In its brief in this court respondent reiterates its contention that there is positive testimony that Stewart did not try to use the pin lifter before going between the cars to effect the coupling by hand. There is no such evidence. As pointed out in our original brief, the testimony of Martin, the engineer, in this connection (R. 46) is nothing more or less than that he did not notice or pay attention to what Stewart did in that regard. Under the circumstances, Martin doubtless could not have observed whether Stewart did or did not use the pin lifter; but we have his word for it that he paid no attention to what Stewart did

in that connection. Where there is evidence tending to repel or overthrow such a presumption, concededly the presumption takes flight and the jury cannot then be rightfully authorized to consider it as though it were evidence in the case to be weighed against that evidence which in fact puts the presumption out of the case. But where, as here, there is no evidence one way or the other touching the matter, the presumption that the law raises remains in the case and it is not error to so inform the jury.

In *Baltimore & Potomac R. R. Co. v. Landrigan,* supra, 191 U. S. 461, the action was one for wrongful death. The deceased was employed as a machinist in the defendant's roundhouse, but was run over and killed at night, after his working hours, by a car or train of the defendant while attempting to cross the defendant's tracks on his way home. There was no eyewitness to the casualty, but this Court held that the evidence sufficed to warrant the inference that the deceased was run over by a car that had been allowed to break away from other cars through the defendant's negligence. In the course of the opinion the Court (l. c. 473, 474) said:

> "(1) There was no error in instructing the jury that in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked and listened. The law was so declared in *Texas & Pacific Railway Co. v. Gentry,* 163 U. S. 353, 366. The case was a natural extension of prior cases. The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to.
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"The court did not tell the jury that all those who cross railroad tracks, stop, look and listen, or that the deceased did so, but that, in the absence of evidence to the contrary, he was presumed to have done so, and it was left to the jury to say if there was such evidence."

In the instant case the District Court did not tell the jury that Stewart used the pin lifter, but that in the absence of evidence to the contrary he was presumed to have done so; and it was left to the jury to say if there was such evidence. We respectfully say that as a matter of law there was no such evidence. But surely it cannot be doubted that the jurors, being the judges of the weight to be given to the testimony of any witness, were at liberty to find that when Martin said he did not **notice** Stewart he meant just what the words naturally imply, namely, that he did not **pay attention** to whether Stewart did or did not use the pin lifter.

And we further respectfully submit that the giving of this instruction was not at all inconsistent with the burden of proof imposed by law upon a plaintiff, as the Circuit Court of Appeals in its first opinion appeared to think. In this case the plaintiff below carried the burden resting upon her to show a defective appliance when she showed by the testimony of the witness Stogner (R. 26-40) that respondent did not have its car equipped with a pin lifter such as the law requires, one that could be operated without the necessity of going between the cars; that Stewart was sent to encounter a defective and inoperative coupling device because of respondent's failure to comply with the law. It was not sought by this instruction to permit the jury first to utilize the presumption (in the absence of evidence to the contrary) that Stewart tried to use the pin lifter before going between the cars and then from this to presume or infer that the pin lifter was in fact

inoperative; nor, in view of other portions of the charge, to which we shall presently refer, could the instruction have been misleading in this regard.

The Court of Appeals in its first opinion referred, in this connection, to Looney v. Metropolitan Railroad Co., 200 U. S. 480, 487, 488. But the Looney case is, we submit, wholly without application. The action was there one for death, but the case did not involve the propriety of giving such an instruction as this, or any other instruction. This Court simply held that the plaintiff's evidence failed to show any actionable negligence on the part of defendant. The Court expressly recognized that there was a presumption of care on the part of the person killed; that a presumption of the performance of duty attended the deceased; but said that a like presumption attended the defendant, and that the negligence of a defendant may not be inferred merely from a presumption of care on the part of the person killed. That ruling is here far afield.

And this isolated portion of the charge is not to be considered alone. The rule is that in determining whether error inheres in the charge, the charge as a whole must be considered and not some isolated portion of it. And in the instant case, when the charge as a whole is considered, it is, we submit, altogether clear that that portion thereof referring to the presumption aforesaid could not conceivably have had the effect of causing the jurors to believe that because of said presumption as to the conduct of the deceased they were authorized to infer that the coupling device was defective, or that such presumption could have the effect of relieving the plaintiff of the burden of proving by the preponderance or greater weight of the evidence that the defendant did not have its car equipped with a coupler coupling automatically by impact without the necessity of men going between the ends of the cars and that Stewart's death proximately resulted

therefrom. The Court fully, correctly and repeatedly instructed the jury as to the burden resting upon the plaintiff, and repeatedly told the jury that there was no presumption that the couplers would not couple automatically by impact. We set out below those portions of the charge relating to these matters as follows:

"The Court charges the jury that before plaintiff may recover in this case, she must prove by the preponderance or the greater weight of the evidence that the injury to and death of plaintiff's decedent were caused by the cars in question not being equipped with couplers coupling automatically by impact.

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"You cannot presume that the couplers would not couple by impact, but on the contrary the law places on plaintiff the burden of proving such facts to your reasonable satisfaction by the preponderance or greater weight of the credible evidence.

"This burden abides with plaintiff throughout the case, and if you find that plaintiff has not proved the above facts to your reasonable satisfaction by the preponderance or greater weight of the evidence, or if you find the evidence on the subject to be evenly balanced, then in either state of events, plaintiff is not entitled to recover against defendant, and your verdict must be for the defendant (R. 337).

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"The Court charges the jury that you cannot presume that the couplers on the cars in question would not couple automatically by impact, but on the contrary the law places upon the plaintiff the burden of proving such facts to your reasonable satisfaction by the preponderance or greater weight of the evidence.

"Unless plaintiff has proven such facts to your reasonable satisfaction as above stated, then plaintiff is not entitled to recover in this case, and your verdict must be for the defendant.

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"The Court charges the jury in this case that the burden of proof rests upon the plaintiff to prove by the preponderance, that is, the greater weight of the credible evidence, the facts necessary to entitle her to recover, and the burden of proof does not shift from side to side, but constantly remains with the plaintiff; therefore, if you find the evidence to be evenly balanced in this case, or if you find plaintiff has not proved by the preponderance, that is, the greater weight of the evidence, facts necessary to entitle her to recover, then your verdict must be for the defendant.

"The Court charges the jury, unless you find from the preponderance or greater weight of the evidence in this case, that the proximate cause of injury and death of decedent was caused by a coupler or couplers that would not couple automatically by impact, then your verdict must be for the defendant.

"The Court charges the jury that no liability on the part of the defendant arises from the mere happening of an accident. The mere fact that an accident happened is not proof that the coupler would not couple automatically by impact.

"There is no presumption in this case that the coupler would not couple automatically by impact.

"The burden of proof predominates upon plaintiff, from the beginning to the end, to prove by the preponderance of the evidence the couplers would not couple automatically by impact, and, as a proximate result thereof, plaintiff's decedent was injured and died" (R. 338, 339).

For the reasons stated above, petitioner respectfully submits that it was not even technical error to charge the jury that, in the absence of evidence to the contrary, the law presumes that Stewart, whose lips are closed in death, tried to use the pin lifter before risking life and limb by going between the cars to effect the coupling by hand; and that, certainly, when the charge as a whole is con-

sidered, there can be no ground to contend that respondent was deprived of any substantial right by reason of anything contained therein or anything omitted therefrom. It would, indeed, be difficult to find a charge in a case of this character more complete, comprehensive or fairer to the parties litigant.

Petitioner therefore prays that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit of date April 14, 1941 (R. 444), be reversed and that the judgment of the District Court be affirmed.

Respectfully submitted,

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